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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN LUIS DAVALOS, Defendant and Appellant.	H025682 (Santa Clara County Super. Ct. No. CC246497)

Defendant Juan Luis Davalos was convicted at jury trial of first degree burglary and misdemeanor sexual battery and he also admitted a strike prior and a prior serious felony conviction. The trial court denied defendant's motion to strike the priors and sentenced him to 13 years in state prison. On appeal, defendant challenges the propriety of the court's rulings allowing the prosecution to file an amended information on the first day of trial, the admission of evidence involving a prior attempted burglary, and the sufficiency of the evidence of first degree burglary.

FACTS

In the early morning hours of April 20, 2002, the victim and her five-year-old son were sleeping in the same bed in her apartment in San Jose when she felt "[s]omebody getting into the bed with me and putting their arm around me." The victim smelled alcohol on the person's breath and felt kissing and licking on the back of her neck. Also, "the person was moving their arm and touching my butt and my stomach area and trying

to put their hand down my pants." The victim thought the person might be her child's father, and when she felt the person's hand move inside the front of her sweatpants, she said "stop" and grabbed the hand and moved it away. The person moved it back to where he had put it and did not stop. The victim "got up and moved to the other side of my son." When she lay back down in bed, the man's face was illuminated by the light from the hallway which she had turned off when she went to bed. The victim realized, "oh, my God, I've never seen this person before." She started yelling and told the man to get out of her house and that she was going to call 911. The victim stated, "it looked like he passed out" and she picked up the telephone and called 911.

The victim told the 911 dispatcher that "there's some guy in my house. I don't know who he is. He just fucking came in here. He's drunk." The victim was in the living room staying on the phone with the dispatcher when she heard the man moving around. She thought he was "going to get up and leave." The dispatcher told the victim that the police had arrived, so she unlocked the front door to the apartment. The man, whom she identified at trial as defendant, then came out of the bedroom into the living room and went out the front door. The victim testified that with the light on in the hall, a person standing in the doorway to the bedroom could see the bed and if there was someone in it. The kitchen light was also turned on.

San Jose Police Officer Thomas Barnard was one of two officers who responded to the victim's apartment around 2:47 a.m. As he walked up the stairs to the second floor, he saw defendant leave the apartment and start down the stairs. His hands were in his pockets and he walked with "a slight stagger"; his balance looked "a little unsteady" coming down the staircase. Defendant did not respond promptly to Barnard's commands, and Barnard noticed bloodshot eyes and concluded defendant "appear[ed] to be under the influence of alcohol."

Officer Gerardo Rodriguez spoke with defendant in Spanish at the police station at 5:24 a.m. at the same time defendant's blood was drawn after his arrest. Defendant,

whose blood alcohol level turned about to be .18, appeared intoxicated but was responsive and able to answer questions. Defendant said that he had a few beers, that he had been drinking by himself and that he left his home with some friends to go to a club downtown. Defendant said that he did not remember anything that had taken place between 10:00 p.m. and 2:00 a.m. Rodriguez asked defendant specifically if he had been in an apartment with someone and he responded he could not remember. Defendant said that he knew a woman who lived in the apartment complex, but he could not remember her name and he did not know where she lived. Defendant said something about hearing voices and someone saying the police were there and he woke up. Rodriguez testified "[h]e was sleeping in bed, he woke up, and I arrested him."

Defendant testified on his own behalf. He stated that he woke on April 19 at 5:00 a.m. to go to work. Around 3:00 p.m., he left his dry wall construction job in Berkeley and went to a second job in Burlingame. His "extra" job was where he began to drink. He was there for two hours and drank three 24-ounce cans of Budweiser. Then he switched to Coronas, but he could not remember how many. A friend drove him from Burlingame to his home in San Jose where he arrived around 7:00 p.m. Defendant and another friend divided a 12-pack of beer "half and half." Defendant had not had anything to eat since that morning and was "feeling drunk." After finishing the beer at home, defendant remembered walking to a restaurant but he did not remember if he ate and if he was drinking there. He did not remember leaving the restaurant.

Defendant testified he did not remember going to the victim's apartment, entering it, locking the front door behind him, turning on some lights, getting into bed with the victim, kissing her, licking her neck, grabbing her buttocks, putting his hand on her, being yelled at by the victim, or waking up in her apartment. He testified that he was "very drunk, and since [he] hadn't slept since 5:00," he could not remember what happened.

Defendant did not remember being questioned by police or what he had said. He did not remember telling the police that he had a female friend whom he thought he was visiting who lived in or near the victim's apartment complex. Defendant's friend lived on McCreery Avenue, the same as the victim, but he did not know if she lived in an upstairs or downstairs apartment because he had never been there. He had met the woman at a nightclub and he had seen her on about four occasions.

Additional testimony, to be discussed when relevant, consisted of the expert testimony of a forensic toxicologist on the effects of blood alcohol content on the human body and the facts of a prior attempted burglary in 1998 for which defendant was convicted.

As stated above, the jury found defendant guilty of first degree burglary and misdemeanor sexual battery. (Pen. Code, §§ 459, 460, subd. (a), 243.4, subd. (d).)[1] This appeal ensued.

ISSUES ON APPEAL

Defendant contends: (1) the trial court abused its discretion when it allowed the prosecution to file an amended information on the first day of trial; (2) "[t]he belated and inflammatory amendment to the information violated [defendant]'s federal constitutional rights to adequate notice of the charges against him and to due process of law"; (3) the trial court violated the Evidence Code when it allowed the prosecution to present evidence of the facts underlying defendant's prior conviction of attempted burglary; and (4) the evidence was insufficient to support defendant's conviction of first degree burglary.

AMENDED INFORMATION

The original information, filed August 15, 2002, charged defendant in count one with the crime of first degree burglary by "enter[ing] an inhabited dwelling house, . . .

[1] Further statutory references are to the Penal Code unless otherwise stated.

with the intent to commit (a) felony(ies), sexual battery." The first amended information filed on September 17, 2002, the first day of trial, amended the first count to charge defendant with "enter[ing] an inhabited dwelling house, *and room* located at McCreery Avenue, San Jose[,] with the intent to commit (a) felony(ies), sexual battery, *sexual penetration by foreign object while victim unconscious, rape while victim unconscious.*" (New language in italics.) The prosecutor argued that since a burglary can be committed upon entry into a room within a dwelling (*People v. Sparks* (2002) 28 Cal.4th 71), the additional alleged intended felonies-i.e., " 'sexual penetration by foreign object while victim is unconscious,' and the language 'rape while victim unconscious' "-related to the felonies that defendant intended to commit when he entered the victim's bedroom. The basis for this inference was preliminary hearing testimony that the defendant "entered the room while the victim was asleep and that she was woken up by him fondling her in the bed."

Defense counsel objected to the filing of the first amended information stating the new language substantially and prejudicially affected defendant's rights because of the late notice defendant was given that the prosecution was going to change its theory of the case. Counsel stated the testimony at preliminary hearing "at most" indicated a touching on the part of the defendant and nothing more. With the proposed new language, "the allegations are substantially changed and more egregious. I think . . . there's going to be definite shock at least to the minds of the jurors when they hear these are the things he allegedly did." Counsel concluded, "given this new language, we're dealing with a whole different case now." The trial court permitted the amendment stating, "it is this Court's opinion that the defendant is not prejudiced by this late amendment. It certainly does not come as a surprise because the facts are all there. . . . [C]ertainly it's supported by the evidence."

In this court, defendant asserts that the new allegations were not supported by evidence presented at the preliminary hearing. He states "[t]here was no evidence . . .

that [defendant] entered [the victim's] bedroom (or her home) with the intent to either rape her or otherwise penetrate her while she was unconscious. The trial court did not cite to any specific evidence to support its statement that 'the facts are all there.' Nor did the People cite any specific portion of the preliminary examination transcript in support of the proposed amendment." At the preliminary hearing, the victim testified that she had been awakened by "somebody in my bed, . . . beside me," and she realized that somebody put their hand or arm around her stomach, was kissing the back of her neck, and was feeling her "butt and also started putting their hand by the top of my sweat[pants], like they were going to try to get it down and I said stop." She said she lay there with somebody's hand on her for "probably five minutes" before she told him to stop. When she told him to stop, he continued to "feel on me," and he continued to kiss her neck, touch her buttocks and stomach, and move his hand down her body. The victim finally moved to the other side of her son after which defendant did not continue to try to hold her or push closer to her. The victim could not tell whether defendant had an erection. Defendant contends this evidence does not support count one as amended; consequently, reversal is required.

"An . . . information may be amended by the district attorney . . . without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an . . . information . . . , for any defect or insufficiency, at any stage of the proceedings . . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.) Permitting an amendment "is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed absent a clear abuse of discretion." (*People v. Sanders* (1987) 191 Cal.App.3d 79, 85.) "Section 1009 specifically proscribes amending an information to charge an offense not shown by the evidence taken at the preliminary hearing. This rule has remained virtually

unchanged for over 80 years. [¶] . . . We have found no exception to this express provision of section 1009 . . . ." (*People v. Winters* (1990) 221 Cal.App.3d 997, 1007-1008 [defendant waived preliminary hearing on possession of methamphetamine for sale; error to allow prosecution to amend information during trial to add transportation count].)

Burglary is the entry of a dwelling or room with the intent to commit grand or petit larceny or any felony. (§ 459.) The evidence at the preliminary hearing showed that defendant entered the victim's room under lighting conditions that allowed him to see that someone was in the bed, and he got into bed next to the victim and immediately started sexual touching and fondling. The touching included "start[ing] putting their hand by the top of my sweat[pants], like they were going to try to get it down and I said stop." But "[he] kept trying to feel on me . . . ," and he continued to kiss her neck, touch her buttocks and stomach, move his hand down her body, and again attempt to put his hand down the front of her pants. This evidence is sufficient to show a sexual battery and that defendant intended to digitally penetrate the victim while she slept and that he went on touching her despite her awakening and command to stop. Although defendant had not reached the stage of attempting penile penetration, the touching and feeling he was perpetrating support the inference that he intended to accomplish the penile penetration of the victim. The additional language did not substantially change the information.

Nor did the amended language prejudice defendant. The complained of language, "rape while victim unconscious" and "sexual penetration by foreign object while victim unconscious" are terms used in sections 261 and 289. They described the outcome that the preliminary hearing testimony showed he contemplated. Defendant had notice from the time of the preliminary hearing that he had to defend against a first degree burglary charge in which the felonious intent alleged was based on his sexual conduct immediately following the entry. "So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s)

charged in the information, a defendant has all the notice the Constitution requires." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342.)

In addition, defendant was not surprised by the changed language. During the preliminary hearing, the prosecutor stated that he believed defendant intended to commit rape (§ 261) "or a [section] 220," assault with intent to commit rape, penetration of genitals or anus with a foreign object, and other specified offenses. Defense counsel also stated "[t]he potential charge is a [section] 220 or 261." Thus, both parties were aware of the evidence at the preliminary hearing and the state of each other's mind.

Furthermore, defendant was not deprived of his right to a fair trial. Although defendant repeatedly asserts the allegations were not supported by the evidence presented at preliminary hearing, we do not agree. The victim's testimony described actions which, if unhindered, would have resulted in defendant digitally penetrating her at the very least. Whether or not defendant could have accomplished penile penetration in his intoxicated state is not the issue here. Defendant's actions immediately after he entered the room show that he intended the sexual penetration of the victim when he entered the room. Defendant had notice of this from the time of the preliminary hearing and he had the opportunity to defend against it at the trial. His substantial rights were not prejudiced.

Finally, the amended language did not "inflame the jury." " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence [or statutory language] the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. . . . [¶] . . . [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the

jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

The amended information containing the relevant statutory language merely informed the jury of the charges the prosecution had brought against defendant. The statement of the charges, while possibly distasteful to the jury, was not of such a nature as to arouse the jurors' emotions or to blind them to their duty to decide whether or not the prosecution had proven the charges beyond a reasonable doubt. The trial court did not exceed the bounds of reason in permitting amendment of the information. There was no abuse of discretion.

PRIOR CONVICTION

Next, defendant claims the trial court erred prejudicially in admitting evidence of the facts of his prior attempted burglary to show intent, common plan and design and absence of mistake. Defendant argues that the testimony was inadmissible under Evidence Code section 1101 (hereafter section 1101) and that the trial court abused its discretion when it determined that the probative value of the evidence was not substantially outweighed by its prejudicial impact.

The prosecution filed a motion in limine requesting to introduce facts relating to the 1998 attempted burglary of the Joseph Santos residence to show "some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act . . . did not reasonably and in good faith believe that the victim consented) . . . ." (§ 1101, subd. (b).) The prosecutor stated that in the 1998 case, defendant went "to a family dwelling also at night, he attempted to break into the house by jimmying or trying to remove the screen on one or possibly two windows," and then he fled from the residence when motion sensor lights went on. He was caught shortly thereafter. The prosecutor stated that the similarities between the current case and the 1998 case were "striking" because defendant "fled on both occasions," and "was attempting to enter a woman's bedroom in the 1998

case and actually entered the woman's bedroom in the current case." The prosecutor concluded that defendant's conduct in the 1998 case was "sufficiently similar and close enough in time to show absence of mistake, intent and a plan and design . . . ." He stated, "aside from the similarity, the fact that the defendant suffered a conviction from that prior case" lessened the prejudice which may arise upon the jury learning of the facts of the case.

Defense counsel responded that there were "a lot of differences" between the two cases. In the prior case, defendant attempted entry by removal of window screens whereas in the current case, he walked in through an unlocked front door. The victim was home with her small son; Mrs. Santos was home with an adult male, her husband. Defendant fled the Santos home; he passed out in the victim's home. Defense counsel argued that the 1998 case "was so dissimilar not to show intent . . . or common design or scheme . . . ." Defense counsel also responded to the prosecutor's assertion that the prior case established intent by pointing out that in the prior case defendant was alleged to have intended theft which is "completely two different crimes."

The trial court granted the prosecutor's motion. Before Joseph Santos testified, the court instructed the jury it could consider his testimony not "to prove that the defendant is a person of bad character, or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining [whether] . . . it tends to show . . . [a] characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged, or an absence of mistake. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case."

Santos testified that on March 22, 1998, he and his wife were sleeping in separate bedrooms. His wife woke him up by coming into his bedroom "very nervous[] [and]

[e]xcited." It was nighttime and it was dark. He called 911. The screen on Mrs. Santos's bedroom window had been unhooked. Santos had left a ladder outside his back fence. Santos testified that his wife always closed the window blinds when she went to bed at night.

Defendant testified that he was hiding in the Santos's backyard and went inside the house because "people were following me or chasing me and . . . I was hiding because these people wanted to beat me up." Defendant admitted not giving the officers his true name because there was an arrest warrant out for him. He explained that he drove a car and did not show up for court. Defendant pled guilty to attempted burglary under a different name because his mother was sick and his attorney told him that if he pled guilty he would get out sooner.

Defendant now claims the evidence of the prior attempted burglary did not satisfy the requirements for admissibility under section 1101. He claims the Santos incident "bore so little resemblance to [defendant]'s alleged behavior in the instant case that the evidence fell woefully short of the requirements for admissibility."

This court reviews a trial court's determination of admissibility under section 1101 for abuse of discretion (*People v. Kipp* (1998) 18 Cal.4th 349, 369), namely, that the court exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Section 1101 states: "(a) . . . evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act." Such evidence may be used to establish a defendant's motive, intent, identity, common plan or scheme, lack of mistake, or to bolster the victim's credibility. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922.)

In determining the admissibility of other crimes evidence, the trial court " 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong.' " (*People v. Thompson* (1980) 27 Cal.3d 303, 316.) Any doubt as to admissibility must be resolved in favor of the accused. (*Id*. at p. 318.)

Defendant asserts that the 1998 case was not admissible to prove intent because the intent in that case was to commit theft and the intent in the current case was completely different (sexual assault). "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879.) However, the least degree of similarity between the uncharged and charged acts is sufficient to prove intent because the recurrence of a similar result tends to negative accident, inadvertence, good faith, or other innocent mental state. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Defendant raised the issue of intent in this case by pleading not guilty and by eliciting evidence that he was intoxicated when he entered the victim's bedroom and touched her. The 1998 burglary was relevant on the issue of intent because defendant's admission that he attempted to enter a woman's bedroom in the nighttime when she could be supposed to be sleeping to commit a felony inside tended to negative his claim that on this occasion, he did not have the requisite intent.

Defendant also contends that the prior conviction is inadmissible to show a common design or plan and absence of mistake. Since we have found that the evidence was admissible to show intent, we need not address these additional claims.

SUFFICIENCY OF THE EVIDENCE

Next, defendant asserts that the evidence was insufficient to support conviction of first degree burglary. He claims that there was insufficient evidence of specific intent to commit any of the three target crimes alleged in the amended information, that is, felony sexual battery, sexual penetration by a foreign object while the victim was unconscious, or rape while the victim was unconscious. Defendant states that as to sexual battery, there was no evidence that defendant either restrained or intended to restrain the victim. As to rape or penetration with a foreign object, defendant states there was no evidence from which a reasonable trier of fact could conclude that he intended to penetrate the victim either with his penis or with any other object.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence-that is, evidence that is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: . . . whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The appellate court is without power to reweigh or reinterpret the evidence on appeal. (*People v. Pace* (1994) 27 Cal.App.4th 795, 798.) Before the judgment below can be set aside for insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

" 'The felonious intent which supports a burglary charge must usually be inferred from all the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] "When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal." [Citations.]' " (*People v. Bermudez* (1984) 157 Cal.App.3d 619, 625.)

The prosecution did not need to show that defendant accomplished the restraint or penetration of the victim. It was enough for the prosecution to show his purpose in entering. This we learn from his actions. In the early morning hours, defendant entered the victim's apartment where he had no business to be, turned on the lights in the kitchen and hall, and locked the door. "Burglarious intent can reasonably be inferred from an unlawful entry alone." (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786.) In addition, evidence of defendant's prior attempted burglary is relevant on his intent in this case. Defendant then went to the victim's bedroom, lay down on the bed next to her, put his arm around her stomach, and started kissing and fondling her and trying to put his hand down her pants. He disregarded her instruction to stop. The People compare this conduct to that in *People v. Moody* (1976) 59 Cal.App.3d 357, 362. There, a family's 15-year-old babysitter sent the children to bed shortly before 3:00 a.m. After they were upstairs, she heard a noise. She turned and saw Moody standing in the hallway with his arms outstretched. She gasped and Moody turned and fled. (*Id.* at p. 360.) The reviewing court stated, "[f]rom the above facts, the jury could have concluded and there was substantial evidence to support a finding that appellant had either entered the house with an intent to commit theft or to commit rape." (*Id*. at p. 363.) The evidence in our case is considerably further along the sexual spectrum. Substantial evidence supports the verdicts.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.